SUPREME COURT, U. S.

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No. 907

In the

Supreme Court of the United States

OCTOBER TERM, 1967

YOUNG-PETERSON CONSTRUCTION, INC.,
an Illinois Corporation,

Petitioner,

vs.

THE POTOMAC INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, a Corporation,

Respondent.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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STATUTE CITED

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RULE CITED

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The Potomac Insurance Company of the District of Columbia, defendant in this cause, respectfully states that the Petition of Young-Peterson Construction, Inc., does not demonstrate any of the grounds for Certiorari as set out in Rule 19 of the Rules of this Court and therefore prays that this Court not issue a Writ of

Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on July 18, 1967.

QUESTION PRESENTED

Was the action of the United States Court of Appeals for the Seventh Circuit, in affirming the District Court's holding, and in denying a Petition for Rehearing by holding Ill. Rev. Stat. ch. 73, § 766 (1957) inapplicable to a verbal binder for insurance such action which:

> ". . . has so far departed from the accepted and unusual course of judicial proceeding, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." U.S. Sup. Ct. Rule 19b.

STATUTE INVOLVED

Section 766 of the Illinois Insurance Code provides:

> "No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty, or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefore, of which a copy is attached to or endorsed on the policy, and made a part thereof. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. This section shall not apply to marine or transportation insurance." (Ill. Rev. Stat. ch 73, § 766 (1957))

STATEMENT OF THE CASE

The Plaintiff, Young-Peterson Construction, Inc., requested that Mr. David B. Peck, an insurance agent with Lamb, Little & Company, secure only comprehensive, fire and theft coverages on certain trucks which allegedly belonged to the corporation. (A. 172)

Prior to April 24, 1959, the date upon which the vehicles were allegedly stolen, Mr. Peck, a long-time friend of Mr. Mullen, had had a conversation with Mr. Mullen, one of the officers of Young-Peterson, on the subject of certain insurance for the trucks. (A. 164) A written notice of binder was sent to the insurance company, but there was no official binder to Young-Peterson per se. (A. 164) Mr. Peck orally agreed to bind comprehensive, fire and theft coverage. No written binder or policy was ever issued by the Defendant or any other person to Young-Peterson Construction, Inc.

Although no objection was made at the time of filing the amended answer and the affirmative defenses, the plaintiff later objected to the affirmative defense of misrepresentation on the grounds that Ill. Rev. Stat. ch 73, § 766 barred a policy defense based upon misrepresentation unless the misrepresentation was in writing.

It was the position of the defendant in the trial court and in its brief to the Court of Appeals, and its brief filed in opposition to plaintiff's Petition for Rehearing in the Court of Appeals, that the statute upon which the plaintiff relies here, by its terms, only deals with written binders or policies of insurance. Since in this case there was no written binder or policy, the statute is inapplicable and both the District Court and the Court of Appeals were correct in so ruling.

Although the plaintiff is correct in stating that the judgment of the Court of Appeals against the plaintiff was based upon an opinion which dismissed this point, among others, by simply stating, at the close that:

> "We have considered all of these contentions and find them lacking in merit. . . ."

it should also be noted that plaintiff filed a nine (9) page Petition for Rehearing in the Court of Appeals which raised only the issue now raised in its Petition for Writ of Certiorari. Thereafter, the Court of Appeals also denied plaintiff's Petition for Rehearing.

The District Court and the Court of Appeals did not without reason refuse to apply Illinois law as plaintiff now suggests. Those courts merely held the Illinois statute inapplicable to this case and such action does not indicate as the plaintiff contends, that the Court of Appeals:

> ". . . has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision."

ARGUMENT

It has been the defendant's position, in the trial court and in the Court of Appeals, that the Ill. Rev. Stat. ch 73 § 766, urged by plaintiff as barring the defendant's affirmative defenses of misrepresentation, applies only to written policies, endorsements, riders, applications and in this case binders. Plaintiff attempts to avoid this issue completely by making the offhand contention, that a written binder had issued. It asserts that unless the misrepresentation relied upon by the insurer is in writing, a defense on the misrepresentation is barred by the statute. In spite of this position, it is curious that plaintiff finds it necessary to assert that a written binder had issued. (See Pages 3 and 5 of plaintiff's Petition for Writ of Certiorari) These allegations are made in spite of the testimony of Mr. David Peck, a long time friend of Mr. Mullen. (A. 177) Mr. Peck, an officer of Lamb, Little & Company, was called by the plaintiff, and under the questioning of plaintiff's counsel testified as follows on direct examination:

> "Prior to April 24th, I had many conversations with Mr. Mullen relative to insurance on the vehicles. In that preceding week I had a conversation with Mr. Mullen on the subject. *A written notice of binder was sent to the insurance company. There was no official binder to Young-Peterson Company, per se.*" (A. 164) (emphasis supplied)

No written binder had ever been issued by anyone. The trial judge, Judge Parsons, recognized that no written binder had been issued and further, that since the binder was oral, Ill. Rev. Stat. ch 73, § 766 did not apply. This is illustrated by the following:

"Mr. Cook . . . Section 766 of the Insurance Code as adopted in 1937 provides:

> 'No representation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance or breach of a condition of such policy shall defeat or void the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor of which a copy is attached to or endorsed on the policy or made a part thereof.
>
> 'No such misrepresentation or false warranty shall defeat or void the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company.'

"Now, in the evidence in this case there is no evidence of any declaration which is an essential condition precedent to the assertion of this defense.

"The Court: Well, of course, this policy was handled by an oral application and. . . ." (A. 250, 251)

A reading of the Ill. Rev. Stat. ch 73, § 766 illustrates that it was meant to apply only to written policies, endorsements, riders or applications. The obvious intent of the statute is to place upon the insurer, when it issues a written policy, the burden of including all representations or warranties upon which it wishes to rely. The insurer can protect itself by including all representations and warranties in the written contract. In the case of an oral agreement, it is not only impossible to attach a w ten document to an oral binder, as would be required by the statute, but the extension of the statute to an oral binder would leave the insurer without means to defend against any misrepresentations by the insured.

In cases of fraud, where an insured had orally bound coverage, under the plaintiff's theory, the insurer would always be defenseless against fraud and would have no recourse whatsoever under the law. This is not the law and should not be the law.

It is respectfully submitted that the District Court and the Court of Appeals properly rejected plaintiff's contention that Ill. Rev. Stat. ch 73, § 766 barred the defense of misrepresentation in this case.

The District Court and the Court of Appeals did not arbitrarily refuse to apply Illinois law to the case at bar, but they correctly refused to apply a statute which was not applicable to the facts in question.

CONCLUSION

It is submitted that the contentions raised in plaintiff's Petition, were fairly considered by both the District Court and the Court of Appeals and that those courts denied such contentions not without reason, but because the statute cited was inapplicable. The action of the trial judge and the action of the Court of Appeals in approving that action was not so unusual or contrary to the decisions of this court and so neglectful of the mandatory applications of state law in Federal Courts so as to justify petitioner's request for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

It is submitted that the request of petitioner for Writ of Certiorari should be denied.

Respectfully submitted,

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